

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT KNOXVILLE
MAY 22, 2003

KATHY DAVENPORT V. WAL-MART SUPERCENTER

**Direct Appeal from the Washington County Chancery Court
No. 34033 G. Richard Johnson, Chancellor**

Filed October 7, 2003

No. E2002-02156-WC-R3-CV

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e) for hearing and reporting of findings of fact and conclusions of law. The employer asserts the trial court erred in adopting the medical impairment rating of the evaluating physician rather than the opinion of the treating physician. We affirm.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the
Washington County Chancery Court is Affirmed.**

HOWELL N. PEOPLES, Sp. J., delivered the opinion of the court, in which WILLIAM M. BARKER, JUSTICE, and ROGER E. THAYER, Sp. J., joined.

B. Chadwick Rickman, Allen, Kopet & Associates, PLLC, Knoxville, Tennessee, for the Appellant, Wal-Mart Supercenter.

Larry V. Roberts, Kingsport, Tennessee, for the Appellee, Kathy Davenport.

MEMORANDUM OPINION

Facts

Kathy Davenport was employed by Wal-Mart Supercenter in Johnson City, Tennessee. On December 19, 2000, she suffered a work-injury to her left shoulder. Dr. W.R. Beaver was her treating physician. After conservative treatment failed to produce satisfactory results, he performed surgery to repair a torn rotator cuff on May 10, 2001. Dr. Beaver assessed Ms. Davenport with a seven percent permanent medical impairment to the body as a whole. Dr. William E. Kennedy saw Ms. Davenport on December 10, 2001 for evaluation, and rendered an opinion, based on his examination and review of her medical records, that she has a permanent medical impairment of twelve percent to the body as a whole as a result of the injury to her left shoulder. Because Ms. Davenport returned to work at the same or greater wage, any award is limited to two and one-half times her worker's compensation rate.

Standard of Review

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Tucker v. Foamex, L.P.*, 31 S.W.2d 241, 242 (Tenn. 2000). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases to determine where the preponderance of the evidence lies. *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 773 (Tenn. 2000). "When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's factual findings." *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002). However, this Court is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess independently the weight and credibility to be afforded to such expert testimony. *Id.*

Issue

Did the trial court err in adopting the medical impairment rating of the evaluating physician, Dr. William E. Kennedy, over that of the treating physician, Dr. W. R. Beaver?

Discussion

It is well settled that the trial court has the discretion to accept the opinion of one medical expert over that of another. *Kellerman v. Food Lion, Inc.*, 929S.W.2d 333 (Tenn. 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804 (Tenn. 1990). The learned Chancellor, in a very detailed and thorough bench opinion, discussed the testimony of Ms. Davenport, whom he observed, and that of each of the physicians, pointing out the differences in their testimony and the reasons why he found the testimony of Dr. Kennedy to be more persuasive. Both doctors are

board certified orthopedic surgeons. Dr. Kennedy is also board certified as an independent medical examiner. The physicians have differing interpretations of the AMA Guides. After our own reading of the medical depositions in this case, we find no abuse of discretion.

Conclusion

The judgment of the trial court is affirmed and this case is remanded for any necessary further proceedings. Costs of this appeal are taxed against Wal-Mart Supercenter and its surety

Howell N. Peoples, Special Judge

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AT KNOXVILLE

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No. 34033**

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No. E2002-02156-SC-WCM-CV

JUDGMENT

This case is before the Court upon the motion for review filed by Wal-Mart Supercenter pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Wal-Mart Super Center, for which execution may issue if necessary.

BARKER, J., NOT PARTICIPATING